United States Court of Appeals

for the Second Circuit

PETITION FOR REHEARING EN BANC

75-7161

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

- x

BOSTON M. CHANCE, LOUIS C. MERCADO, et al.,
Plaintiffs-Appellees,

-against-

THE BOARD OF EXAMINERS, et al.,
Defendants,

-and-

THE BOARD OF EDUCATION OF THE CITY OF NEW YORK,
Defendant-Appellant,

-and-

COUNCIL OF SUPERVISORS AND ADMINISTRATORS OF THE CITY OF NEW YORK, LOCAL 1, SASOC, AFL-CIO,
Intervenor-Appellant.

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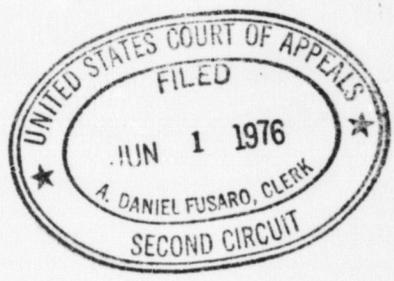
Docket Nos.
75-7161
75-7164



AN APPEAL FROM AN ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

PETITION FOR REHEARING OR REHEARING EN BANC SUBMITTED BY INTERVENOR-APPELLANT COUNCIL OF SUPERVISORS AND ADMINISTRATORS OF THE CITY OF NEW YORK, LOCAL 1, SASOC, AFL-CIO

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Docket No. 75-7161

- x

PETITION FOR REHEARING AND REHEARING EN BANC SUBMITTED BY APPELLANT-INTERVENOR CSA

On January 19, 1976, a panel of this Court (Oakes, Van Graafeiland and Meskill, CCJ) reversed an order of the United States District Court for the Southern District of New York which had superimposed a racial quota requirement upon the "excessing" procedures of the New York City Board of Education (Docket No. 75-7161, Slip Opinion 6587).

and modification of the original decision in this case

In that decision, the panel also indicated that the District Court could consider adopting a Board of Education offer of compromise and according constructive seniority to that limited part of plaintiff's class presently serving in supervisory positions who had taken and failed discriminatory examinations (Slip Opin. at 6597).

On May 17, 1976, the panel granted plaintiffs-appellees' motion for rehearing and amended its decision by ordering the District Court to accord constructive seniority to plaintiffs' entire class on the authority of Franks v. Bowman, 44 U.S.L.W. 4356 (1975). (Rehearing decision annexed hereto.)

Before the rehearing petition, the constructive seniority question came into this case only through an offer of compromise by the Board of Education which applied only to a limited part of plaintifffs' class.* The constructive seniority question was never litigated in District Court; no offer of settlement was made as to the entire class and there is no basis in the record to determine whether a court ordered award of

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*The original decision recognized this:

> "The defendant Board of Education has indicated its willingness to accord constructive seniority to any minority supervisor who failed an examination since invalidated as discriminatory . . . we believe this offer of compromise which appears acceptable to the intervening union should have been adopted by the District Court." (Slip Opin. at 6597).

constructive seniority is proper on the facts of this case.

The rehearing petition was granted on plaintiff-appellee's submission alone, without according the opposing parties the opportunity to respond (rule 40, F.R.A.P.) and despite a CSA request that the Court not determine the issue in this ex parte proceeding. The CSA requested that the issue be left to determination by the District Court because it was not one which had been developed in the initial District Court proceedings.

The opinion on rehearing was in error and should be withdrawn. The Supreme Court decision in Franks v. Bowman, supra, does not support its award of constructive seniority to plaintiff's class, but holds that this question must be left in the first instance to the District Court for decision after development of a full record.

The Court, in Franks, specifically stated:

> ". . . constructive seniority is a form of relief generally applicable under Section 706(g) [of Title VII], we do not in any way modify our previously expressed view that the statutory scheme of Title VII 'implicitly recognizes that there may be cases calling for one remedy but not another, and -- owing to the structure of the federal judiciary -- these choices are of course left in the first instance to the district courts'." (44 U.S. L.W. at 4365) (emphasis added).

There are two salient points of distinction between this case and Franks v. Bowman, supra, which were not considered

seniority rights of other nonclass members provide a

by the panel and which must be resolved before it can be determined whether constructive seniority is proper, namely -- in the business necessity doctrine and the fact that seniority for excessing in the New York City school system is mandated by state statute and not merely by a collective bargaining agreement.

The Court of Appeals' decision in Franks recognized that the business necessity doctrine applies in determining whether an award of constructive seniority is proper, and that even a discrimination-perpetuating seniority system may be defended on this ground. Moreover, the decision made it quite clear that, "Neither Bowman nor the union has attempted to defend the seniority system as a 'business necessity'." (495 F.2d 398, 415)*.

The only issue before the Supreme Court in Franks was whether constructive seniority was an appropriate remedy under Title VII in a case where no party had ever claimed that the seniority system was a business necessity.

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*See also Meadows v. Ford Motor Co., 510 F.2d 939, 949 (6th Cir. 1975) cert. den. 44 U.S.L.W. 3663 (June 25, 1976) which specifically stated:

> "The [district] court would, in dealing with job seniority, need also to consider . . . the interests of the employer in retaining an experienced work force."

panel in this case and with the subsequent decision of

While it may not be necessary to the safe and efficient operation of a trucking company or an assembly line plant to retain the most experienced employees in a layoff situation, does this hold true for a firm of lawyers, an airline company employing pilots or an educational system, "which recognizes the value of pedagogical experience and seniority, and [where] its use is mandated by the New York Education Law."? (Chance v. Board of Examiners, etc., supra, Slip Opin. at 6598).

Can an airline pilot who was not hired until years after he was discouraged from seeking employment because of a discriminatory hiring examination be awarded constructive seniority sufficient to displace an experienced pilot and put him in command of a 747, where his flying experience has been limited to prop aircraft? Or can he be denied his "rightful place" in the seniority hierarchy because the safe and efficient operation of the airline requires it to retain only the most experienced personnel for this job?

And are the school supervisors -- the principals, department heads and school administrators -- analogous to airline pilots or to truck drivers and assembly line employees?

The CSA, in its brief on appeal to this Court, argued that excessing based on seniority had a legitimate pedagogical purpose and was a business necessity in the context of this case (CSA Brief, pp. 40-41). The panel's original decision

ignores the question completely. Until it is adjudicated and resolved, there is no basis for requiring awards of constructive seniority to plaintiff's class.

The second question not considered by the panel in granting rehearing and amending its original decision is what is the effect of New York State Education Law No. 2585 -- which mandates the use of seniority in excessing and which has not been declared unconstitutional -- upon the Court's power to vary the excessive procedure that statute requires.

In Franks v. Bowman, supra, 44 U.S.L.W. at 4365, the Court held that seniority rights "conferred by the employment contract" were not indefeasibly vested since such contract rights can be varied both by statute and by the ability of the union and the employer to modify the seniority system.

Here the seniority rights are not merely the creation of a collective bargaining agreement, but are -- as the panel recognized -- mandated by Section 2585 of state law. Neither the employer nor the union has any ability to modify them, and they have not been varied by another state statute.

Section 2585 has never been declared unconstitutional, nor have plaintiffs ever attempted to attack its constitutionality -- perhaps because of the scant likelihood of success. The statute employs no suspect classifications and has never been used as a subterfuge to discriminate between educational

But the courts have universally enjoined such a "jab"

personnel on racial lines. Rather, it reflects a considered legislative determination that the needs of its own educational system are best served -- in an excessing situation -- by retaining the more experienced personnel rather than the less experienced. Certainly the classifications employed by the statute are "reasonable, not arbitrary . . . and bears a rational relationship to a permissible state objective." Village of Bollo Terre v. Boraas, 416 U.S. 6, 8 (1974).

Before an aware of constructive seniority can be made in this case, the Court must decide whether -- where seniority rights in an excessing situation exist not as a result of a labor contract, but because they are mandated by a nondiscriminatory state statute, never declared unconstitutional -- a federal court can disregard that valid state statute and order a state-created agency to act in a manner contrary to state law.

It may well be that neither the Board of Education nor the CSA had authority under state law to make any offer of compromise on constructive seniority since this will result in according seniority to persons not eligible to receive it under the New York State Education Law and in retaining the less senior persons in an excessing situation in violation of No. 2585.

In Schnectady v. State Division of Human Rights, 37 N.Y.2d 421, 430 (1975) the New York Court of Appeals held

that the power of the State Commission of Human Rights to redress discriminatory practices by public employers does not include the power to order the public employer to act in a manner contrary to other valid provisions of State civil service law. Query whether the Board of Education can agree to act in a manner contrary to State Education Law even to redress prior discriminatory practices? There is substantial precedent that such a body cannot commit itself to an act contrary to state law. See Mannix v. Board of Education, 21 N.Y.2d 455, 459 (1968) and cases cited therein, where the Court held that no act of a board of education could effect a method of by-passing state tenure statutes, as tenure terms "can be changed by the Legislature but never by a board of education."

The panel's rehearing decision, granted without calling for argument by opposing counsel, did not consider the questions raised in this petition. It should be withdrawn and the case remitted to the District Court with directions to determine whether awards of constructive seniority are appropriate in this case or whether they are precluded either because the seniority system* is a business necessity or because it is mandated by a valid state statute which has not been declared unconstitutional in an appropriate procedure.

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*Characterized by the panel as "a system which recognizes the value of pedagogical experience and its use is mandated by the New York Education Law; nor is there any claim that defendants' excessing practices are or have been discriminatory, ..." (Slip Opin. at 6589, 6593).

CONCLUSION

FOR THE FOREGOING REASONS, REHEARING OR REHEARING EN BANC PURSUANT TO RULE 40, F.R.A.P., SHOULD BE GRANTED.

Respectfully submitted,

FRANKLE & GREENWALD
Counsel for Intervenor-Appellant
Council of Supervisors and
Administrators of the City of
New York, Local 1, SASOC, AFL-CIO

Dated: New York, New York

June 1, 1976

CERTIFICATE OF SERVICE

The undersigned certifies that a copy of the attached Petition for Rehearing was mailed by United States mail, postage prepaid, to the following persons on June 1, 1976:

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FRANKLE & GREENWALD

By _____
Leonard Greenwald

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 1112, 1251—September Term, 1974.

(Decided January 19, 1976.)

Docket Nos. 75-7161, 75-7164

BOSTON M. CHANCE, LOUIS C. MERCADO, et al.,

Plaintiffs-Appellees,

v.

THE BOARD OF EXAMINERS, et al.,

Defendants,

and

THE BOARD OF EDUCATION OF THE CITY OF NEW YORK,

Defendant-Appellant,

and

COUNCIL OF SUPERVISORS AND ADMINISTRATORS OF THE CITY OF NEW YORK, LOCAL 1, SASOC, AFL-CIO,

Intervenor-Appellant.

Before:

OAKES, VAN GRAAFEILAND and MESKILL,

Circuit Judges.

ON REHEARING

PER CURIAM:

Following our original opinion in this case a petition for rehearing and suggestion for hearing en banc was timely filed by the plaintiffs-appellees. While such petition was under consideration by the court, another panel decided *Acha* v. *Beame*, No. 75-7388 (2d Cir. Feb. 19, 1976) and the Supreme Court decided *Franks* v. *Bowman Transportation Co.*, 44 U.S.L.W. 4356 (U.S. Mar. 24, 1976). Both these cases support the relief of constructive seniority afforded by this court to the plaintiffs in the Chance class, those who took and failed discriminatory supervisory examinations. They also bear on the relief to be afforded to the members of the Mercado class, so-called, those who "have failed to apply for or take such supervisory examinations because they reasonably believed the supervisory examination to be discriminatory and unrelated to job performance." *Chance* v. *Board of Examiners*, 70 Civ. 4141 (S.D.N.Y. May 21, 1973) (order of Mansfield, J.), at 7. Accordingly we modify so much of our prior decree as relates to the Mercado class and order that the case be remanded to the district court with directions to accord constructive seniority to the members thereof who have heretofore established or can establish by the usual preponderance of the evidence that they qualify as such.

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